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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 475

GREAT LAKES CARBON CORPORATION, *Petitioner,*

v.

CONTINENTAL OIL COMPANY, UNION CARBIDE CORPORATION ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Great Lakes Carbon Corporation, prays that a writ of certiorari issue to review and vacate the Judgment (Appendix, page 15a) of the United States Court of Appeals for the Fifth Circuit rendered and entered May 17th, 1965 in the above styled cause.

Petitioner avers that the Court of Appeals has failed to apply the applicable rule of evidence of this Court set forth in *Clark* v. *United States,* 289 US 1, 15;

and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

This Petition is concerned with certain documents which came from the files of Roy C. Hackley, Jr., one of the attorneys for Continental Oil Co., one of the Respondents. These documents were held by the United States District Court for the Western District of Louisiana to be subject to attorney-client privilege. They are under seal, and have never been seen by Petitioner. They are referred to, hereinafter, as the documents of PX-208, being so identified at the trial when they were offered in evidence.

OPINIONS OF COURTS BELOW

The proceedings in the District Court on February 2, 1959, with respect to the documents of PX-208 are set forth in the Record, Vol. I, pp. 52-103. The Opinion of the District Court about the documents was rendered March 18, 1959 and is in the record, Vol. I, pp. 24-30; the Order of the District Court of May 11, 1959 about the documents is in the Record, Vol. I, pp. 31-34, and the ruling of the District Court, by a letter to counsel dated July 2, 1959, is in the Record, Vol. I, pp. 35-51. The documents were ordered to be sealed and made a part of the appeal record. See Order (R. Vol. IV. pp. 125-126).

The Opinion[1] of the District Court on the merits of the Complaint is set forth in the Record, Vol. IV,

[1] Nine copies of the Record as printed for use in the Court of Appeals below are being filed with this Petition. Hence the District Court's Opinion on the merits, as well as the proceedings in the District Court with respect to the documents of PX-208, are not being printed in the Appendix to this Petition.

page 51, and is reported at 219 F. Supp. 468. It was rendered June 21, 1963.

Upon the appeal being lodged in the Court of Appeals, Petitioner brought a Motion (Appendix, page 1a) for an intermediate Order of the Court of Appeals granting Counsel for Petitioner the right to inspect the documents of PX-208.

On October 24th, 1963, the Court of Appeals entered an Order (Appendix, page 9a) authorizing a hearing on Petitioner's Motion.

The Motion was heard on January 7th, 1964. An Opinion (Appendix, page 10a) was rendered June 9th, 1964 and is reported at 332 F. 2d 588. Decision on the point of law was postponed until the hearing of the cause on the merits.

The hearing on the merits of the appeal was held January 4th, 1965.

A *per curiam* Opinion on the merits (Appendix, page 13a) was rendered May 17th, 1965 and is reported at 345 F. 2d 175.

A Petition for Rehearing (Appendix, page 16a) was filed May 27th, 1965.

The Petition for Rehearing was denied by an Order (Appendix, page 18a) on June 9th, 1965. No Opinion was rendered in connection with the Petition for Rehearing.

JURISDICTION

This is a suit for patent infringement, coupled with a suit for unfair competition. The suit arises under the laws of the United States, Title 28, U.S. Code, Sections 1338(a), 1338(b), and 1400(b).

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1254.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in sustaining a claim of privilege when it failed to rule expressly whether the privilege with respect to the documents of PX-208 had taken flight under the rule of evidence of *Clark* v. *United States,*[2] 289 US 1?

2. Is the decision of the Court of Appeals as to privileged documents so much in conflict with a decision of a different division of the same Court of Appeals (though a quorum of the same judges), affirming (at 263 F. 2d 5) Judge Wright's decision in *Seismograph*

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[2] "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by evidence, will set the confidences free. (Cases cited.) But this conception of the privilege is without support in later rulings. 'It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.' (Cases cited.) To drive the privilege away, there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact.' (Case cited) When that evidence is supplied, the seal of secrecy is broken."

—*Clark* v. *United States,* 289 U.S. 1, 15, 77 L. Ed. 993, 1000.

Service Corp. v. *Offshore Raydist,*[3] 135 F. Supp. 342, as to warrant the exercise of supervisory power by this Court?

3. Where, at the hearing of this cause in the Court of Appeals, one of the Circuit Judges announced from the bench (with the other two judges seeming to agree, *sub silentio*) that Respondents had lost their right to rely on privilege with respect to the documents of PX-208 because Hackley had "tarred himself" by filing a false oath in the Patent Office, and where, in a later *per curiam* Opinion, the Court of Appeals denied Petitioner's Motion to inspect the documents of PX-208 without mentioning the announcement and without mentioning the question as to when privilege takes flight, has the Court of Appeals committed such error as to warrant this Court vacating the *per curiam*

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[3] Judge Wright's Order in the *Seismograph* case included the following:

> "REASONS: The theory of the defendant's case is that the plaintiff has committed a fraud on its rights in connection with the patents in suit. While this information elicted by discovery so far in this case does not, by any means, establish the charge as a fact, sufficient information has been disclosed to break the seal of secrecy respecting the privilege and to let the light in. Clark v. United States, 289 U.S. 1; ALI, Model Code of Evidence, Rule 212."

The *American Law Institute, Model Code of Evidence,* upon which Judge Wright relied in his Order in the *Seismograph* case, reads as follows:

> "Rule 212. LAWYER-CLIENT PRIVILEGE; COMMUNICATION IN AID OF CRIME OR TORT.
>
> "No person has any privilege under Rule 210 if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or to plan to commit a crime or a tort."

Opinion and remanding the cause to the Court of Appeals for an opinion on the point of law as to whether the rule of evidence of *Clark* v. *United States*, 289 US 1, is applicable?

STATUTES INVOLVED

There is no statute governing the questions presented here. The rules of evidence are based on case law.

STATEMENT OF THE CASE

In its Motion (Appendix, p. 1a) filed in the Court of Appeals, Petitioner alleged that the general rule as to privilege did not apply to the documents of PX-208 because, as shown by the Record (Vol. II, pp. 107, 172-178, for example), the Continental Oil Co. attorney involved, had committed a fraud in the Patent Office to advance the cause of his client, and had conspired with personnel of Union Carbide Corporation to deprive Petitioner of its valuable trade property as alleged specifically in the Amended Complaint, R. Vol. I, pp. 1-8.

In its Motion, Petitioner relied, as it had in the District Court, upon an Order made by Judge J. Skelly Wright in the case of *Seismograph Service Corp.* v. *Offshore Raydist,* 135 F. Supp. 342 (D. C. E. D. Louisiana), affirmed 263 F. 2nd 5 (CA-5), where an attorney for Seismograph was ordered to produce his file because he was shown to have participated in the alleged torts, and where the file so produced formed the basis upon which both the District Court and the Court of Appeals there held that torts had been committed. As shown in Footnote 3, *supra,* Judge Wright cited as authority for his Order, *Clark* v. *United States,* 289 US 1.

The question of whether the privilege has taken flight in the present cause was presented to the District Court. See proceedings in the District Court on February 2, 1959, R. Vol. I, pp. 81-86, 89-90. It has been presented to three different divisions of the Court of Appeals for the Fifth Circuit, and to a total of seven judges in that Court, *without ever getting a written Opinion on the point of law involved.*

No judge has written a line on the question. No judge has mentioned any of the authorities on which Petitioner relies. There has been only an *oral* announcement by His Honor, Circuit Judge Brown, at the hearing on January 4th, 1965, and this anouncement was in Petitioner's favor.

Initially, Petitioner's Motion (Appendix, page 1a) was assigned to Circuit Judges Rives and Wisdom. This panel of the Court did not rule on the Motion, but held that the question raised was of sufficient importance to warrant a hearing prior to a hearing on the merits. A hearing was accordingly ordered (Appendix, page 9a).

At the hearing on the Motion on January 7th, 1964, the division of the Court of Appeals consisted of Circuit Judges Cameron and Gewin, and District Judge Ainsworth. This division of the Court did not render an opinion on the question raised by the Motion, either. This division decided that the special hearing should not have been ordered. Consideration of the question was postponed to the time of the final hearing on the merits. (See Decision on the Motion, Appendix, page 10a, and 332 F. 2d 588).

At the regular hearing on the merits on January 4th, 1965 the division of the Court of Appeals consisted

of Circuit Judges Rives and Brown of the Fifth Circuit, and Circuit Judge Maris of the Third Circuit, the latter sitting by designation. It was at this hearing that Judge Brown stated that Petitioner was entitled to inspect the documents of PX-208.[4] His announcement is quoted in the Petition for Rehearing, Appendix, pages 16a-17a.

Then, the *per curiam* Opinion came down on May 17th, 1965, which denied the Motion to inspect the documents without comment on the rule of evidence involved.

A Petition for Rehearing (Appendix, page 16a) was filed May 27th, 1965. This was based solely on the failure of the Court to decide the question of law raised by the Motion to inspect the documents and Judge Brown's announcement at the hearing.

The Petition for Rehearing was denied (Appendix, page 18a) without an opinion.

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[4] Circuit Judges Rives and Brown also sat in the *Seismograph* case, 263 F.2d 5, *supra*, so that these two constituted a quorum in that case, where, in effect, Judge Wright's Order was affirmed, because the controversy was decided in the Court of Appeals on the basis of evidence which Judge Wright had ordered produced from the files of Seismograph's attorney. Thus the rule of evidence in *Clark* v. *United States* was recognized by Judges Rives and Brown in the *Seismograph* case. It was reiterated and applied by Judge Brown in his announcement at the hearing in the present case. But it was ignored in the *per curiam* Opinion. This conflict forms the basis for Question No. 2, above.

ARGUMENT

One of the main questions of law presented to the Court of Appeals in this cause was whether the rule of evidence of *Clark* v. *United States,* 289 U.S. 1 applied to the documents of PX-208.

The Court of Appeals failed to render an opinion on this question.

The denial of the Petition for Rehearing was a refusal to rule on this question.

This complete failure of judicial process warrants the exercise of supervision by this Court. Petitioner is entitled to a ruling by the Court of Appeals, in writing, on whether the facts here are subject to the rule of evidence set forth in *Clark* v. *United States,* 289 US 1, 15; *The American Law Institute Model Code of Evidence,* Rule 212; and the Order of Judge Wright in *Seismograph Service Corporation* v. *Offshore Raydist,* 135 F. Supp. 342, approved by a quorum of the very same judges to whom the question at bar was presented.

In *Clark* v. *United States,* this Court clearly set forth a rule of evidence.

It is a vital function of this Court to exercise its supervisory authority and insure that its rules of evidence are followed.

In *McNabb* v. *United States,* 318 US 332, 341, 87 L. Ed. 819, 824, it is stated that,

> "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts (cases cited) this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions. (Many cases cited)."

The footnote at 318 US 341 states:

> "The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: 'The rules of evidence on which we practice today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped.' J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), pp. 530, 531."

The *McNabb* case dealt with criminal justice, but the exercise of supervisory authority in civil justice is just as important.

When Judge Brown announced from the bench at the hearing that Petitioner was entitled to inspect the documents, Petitioner assumed that all that remained to be done on that point of law before the Court was the entry of a formal Order properly attested. Such an announcement in open court, if later formally ordered and attested, is the equivalent of an Opinion signed by the three judges. See the opinion by Chief Justice Taft in *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission,* 260 US 212, 218,[5] reiterated in *Ayrshire Collieries Corp.* v. *United States,* 331 US 132, 138.

The failure of the *per curiam* Opinion to formalize the announcement of Judge Brown, or, if the Court no longer adhered to his announcement, to say so and

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[5] "Compliance with the statute requires the assent of the three judges, given after the application is made, evidenced by their signatures, or an announcement in open court, with three judges sitting, followed by a formal order, tested as they direct."

—*Cumberland T. & T. Co.* v. *Louisiana Pub. Serv. Com.,* 260 US 212, 218, 67 L. Ed. 217, 223.

explain why, is, we submit, *per se,* grounds for this Court vacating the judgment and remanding the cause to the Court of Appeals for further consideration there.

Before this Court should consider whether the rule of evidence of *Clark* v. *United States, supra,* applies to the facts here, there should be a decision of the lower courts on the question. *Cincinnati, Hamilton & Dayton Railroad Co.* v. *McKeen,* 149 US 259, 37 L. Ed. 725.

The *per curiam* Opinion states (Appendix, at page 15a) that the Court of Appeals examined the impounded documents. However, insofar as this Petition is concerned, it makes no difference whether the Court examined them.

The question of whether or not "the privilege takes flight" cannot be decided by looking at the documents. This must be decided by examining other evidence to see if there is "something to give colour to the charge" of fraud. *Clark* v. *United States,* 289 US 1, 15, 77 L. Ed. 993, 1000. The *per curiam* Opinion of the Court of Appeals does not pretend to contain any ruling on the question of whether there is anything in the record to give colour to the charge of fraud, and this was the main point in Petitioner's Motion (Appendix, page 1a).[6]

General affirmance of the District Court's Opinion (R. Vol. IV, page 51) is not a ruling on the question because the District Court made no ruling on it.

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[6] Judge Brown's announcement is recognition of the fact that there is "something to give colour to the charge."

In the exercise of its general power to supervise the administration of justice in the Federal Courts, the responsibility lies with the Supreme Court to require strict compliance with the rules of evidence laid down by the Supreme Court. We petition this Court to exercise that responsibility in this cause. Cf. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Company,* 345 US 247, 97 L. Ed. 986; *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue,* 314 US 326, 86 L. Ed. 249; *Ayrshire Collieries Corp.* v. *United States,* 331 US 132, 91 L. Ed. 1391; *McNabb* v. *United States,* 318 US 332, 87 L. Ed. 819.

For the above reasons, Petitioner prays that this Court grant the writ of certiorari. With or without setting the cause for a hearing in this Court, we ask that the Judgment of the Court of Appeals of May 17th, 1965 be vacated and the cause remanded to the Court of Appeals for such further proceedings in that Court or the District Court as may be appropriate. See *United States on the Relation of Robinson* v. *Johnson,* 316 US 649, 86 L. Ed. 1732.

Respectfully submitted,

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Service

Service of this Petition has been made upon Respondents by mailing copies to Mr. C. Frederick Leydig, their attorney, One North La Salle Street, Chicago 2, Illinois this 20th day of August, 1965.

Attorney for Petitioner